LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 16 1967
JOHN F. DAVIS, CLERK

No. 933

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CHINA UNION LINES, LTD., PETITIONER,

v.

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

ROBERT EIKEL,
Counsel for Petitioner,
205 Oil & Gas Building,
Houston, Texas 77002

CLARENCE S. EASTHAM
Of Counsel

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 933

CHINA UNION LINES, LTD., PETITIONER,

v.

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

---

1. To the Waiver filed by the Government

The waiver by the Government of its right to file a response is of course no agreement that the petition should be allowed nor that error has been committed below.

However, in Cause No. 838, October Term, 1966, upon the Court's docket, styled *Wyandotte Transportation Company, Union Barge Line Corporation and Cargill, Inc., et al, Petitioners v. United States of America, Respondent,* the

Government's response acknowledges that issues the same as those decided herein, namely allowing the Government to recover *in personam* from a negligent shipowner the costs of wreck-removal, are important questions which merit review by this Court.

In the Memorandum for the United States in that Cause No. 838, pp. 4 and 5, it is acknowledged that the decision of the Court of Appeals for the Fifth Circuit is in conflict with decisions of other Courts of Appeal, but it is denied that the decisions in this instant cause are in conflict with the decision in Cause No. 838 and in *United States v. Wilson*, 235 F.2d 254 (C.A. 2) and states,

> "In the *China Union* case, the government sought (and was granted) relief solely *in rem* against the vessel; it did not seek recovery *in personam*. The statement '. . . the Government could not proceed *in personam* against China Union . . .' (id. at 792) is dictum."

Such reference to the contentions of the Government in the instant China Union case is in error: The Government's libel (R. 39-43) is entitled "United States of America, Libellant v. The Wreck of the UNION RELIANCE and Her Cargo, in rem, and against China Union Lines, Ltd. in personam, Respondents", alleges specific acts of negligence of the vessel and her owners and operators, and prays for citation to issue against China Union and for a decree "against the property and against the respondent for any deficiency for its costs and expenses". The trial Court of course in its earlier decision in reality allowed partial recovery *in personam* of certain expenses in the peculiar manner described in the Petition herein, pp. 40-46, and in its final decision granted recovery *in personam* of the balance of the Government's expenses,

App. D, p. 27, to the Petition, of course affirmed on appeal.

(As this goes to the printer, we have learned that the petition for writ of certiorari has been granted in Cause No. 838. It is respectfully suggested since the issues are the same the petition should therefore here be allowed also.)

2. To the Opposition Brief of A. O. Andersen & Co., Owners of the BEREAN

Petitioner here respectfully points out that no serious attempt is made to justify the gross violations of the statutory rules to avoid collision, as found by both Courts below (complete absence of lookout), admitted by the pilot of the BEREAN, and fully established as proximately causative by the indisputable physical facts.

The opposition brief in generalities simply attempts to describe as proper findings of fact concurred in by the two lower courts what are in reality conclusions of law (or at best mixed findings of fact and conclusions of law) impermissible under the physical facts and the undisputed testimony of the BEREAN's own navigators, and hence not those specific findings of fact based upon substantial evidence, and conclusions of law, which are of course accorded by this Court finality where concurred in by the two lower Courts.

3. To the Opposition Brief Filed on Behalf of Lucy Duncan

This opposition brief is stated to be solely a rebuttal of Petitioner's contention that limitation of liability should not be denied on the ground that the owners had not instructed fully licensed officers how to operate engines when

the evidence clearly established that they had actual knowledge of the way the engines could be operated.

To support these contentions it is thus stated of the Chief Engineer Mr. Dah (properly Hsu Dah).

> "He *never* knew that all four engines could be run astern (R. 2210-15)." (Page 9 of Duncan brief.)

The testimony of Chief Engineer Hsu Dah is directly to the contrary, and there is no other evidence of record: His testimony on this subject is as follows:

R. 2168:

> . . .
>
> "Q. Now, after you became chief engineer in August of 1961, did you examine the engines of that vessel?
>
> "A. I examined the engine of UNION RELIANCE on her way from Kaohsiung to Keelung, with the former engineer of that ship.
>
> "Q. And did you understand how to operate those engines of the UNION RELIANCE, as a result of this examination?
>
> "A. I know. Certainly I know."

R. 2213-2214:

> . . .
>
> "Q. And you didn't know whether it was possible to use four engines astern, did you?
>
> "A. It could be done. However, we never did it that way.
>
> "Q. Chief, isn't it a fact that at the time of the Coast Guard hearing, you didn't know whether it was possible to use all four engines astern?
>
> "A. I knew it was possible to do it, but we never did it in this manner. We had enough power, under

ordinary conditions, to use two engines ahead and two engines astern.

. . .

"Q. Do you understand what a signal means, when the telegraph is rung up and down several times, and is then left on the full astern position?

"A. No. We had no necessity to run four engines astern. Why should we run four engines astern, while we had enough power with two engines? If four engines had to be run astern in emergency, we would have to turn them over and stop, slow; there would not be enough time to do all this."

. . .

At R. 2239, the chief engineer demonstrates clearly he knew that all four engines could be used for astern power; he describes how to couple all four to the shaft to turn it astern.

Secondly, the same statement is made about Captain Hsu Wen Tai,

". . . however, he *never* knew that four engines could be used astern. (Vol. V - R. 1652-4; Vol. X-R. 3814-8.)" (Page 9 of brief.)

What the captain actually testified to was that while the four engines could be used for ahead or astern such was not the practice. At R. 3815-3816 his testimony is as follows:

"Q. Did you know that all four engines on your ship could be made to go astern and move the ship in an astern direction with all four engines being coupled to the shaft?

. . .

> "A. Basically, all four engines could be used for ahead or astern. However, we simply have never tried this . . ."

(Like testimony appears elsewhere in the Record.)

It is respectfully submitted that it is *not* the law that an owner must instruct a fully licensed, experienced captain in all phases of ship operation, particularly where as here it is indisputable under the evidence that one minute of astern propeller turnings out of three between a full astern order and a collision would be completely lost by fully stopping the engines in order to couple all four engines to the shaft whereas no appreciable time or astern power was lost by using only two engines astern.

Nor is it an accurate summary of the testimony of the witness Muh to state, as it is on p. 10 of the Duncan brief, that

> "No examination of the steering engines or electrical equipment was made in spite of his prior knowledge that the consumption of telemotor oil was excessive (Vol. VII - R. 2783-4)."

His testimony was that Lloyd's surveys of the vessel's engines were made, on which he attended, at Keelung and at Kaohsiung, at which times the main engines were opened up, R. 2773, 2782, and the steering engines examined by an operating test. R. 2783. His testimony on the point, after stating there had been no report or record of any trouble with the steering engines, is as follows, R. 2783-2784:

> . . .
>
> "A. Normally, during special survey or annual survey of a ship—even under special survey, the ship

will undergo an operating test. The wheel on the bridge will be turned to the port or starboard, in an operation test. This is all required, even in a special survey, that is, the operation test as such, and generally there is no overhauling of the steering engine or steering gear required.

. . .

"A. As much as I recall, I went to the stern of the ship to look at the rudder. I did not go down to look at the rudder—down to the steering engine room. Oh, no, no; let me think. I did. I did go down to the steering engine room, to see the movement of the rudder, and it was operating normally."

Finally, the brief is in error in stating that there has been substantial alteration of previous positions of Petitioner, if it be of any moment: It has always been the position of Petitioner that the *sole fault* of the UNION RELIANCE in the entire matter was in being navigated so close to her starboard bank that the vessel was caused to sheer across channel, as the quotation from counsel's opening statement on page 12 of the Duncan brief plainly shows; that such fault properly speaking was not causative since the BEREAN was grossly at fault and struck the UNION RELIANCE after she was securely anchored by both anchors.

4. To the Opposition Brief of Mitsubishi International Corporation, et al, as Respondents

With respect to the opposition made to Petitioner's Reason 4 for Granting the Writ, the Mitsubishi brief is in accord with the petition that there is only one District Court case which speaks on this matter of whether the Fire Statute exonerates an owner from liability to cargo

following a collision of ships. That case, *The City of Norwich,* was of course one where the fire *did* originate on the cargo-carrying vessel, not at all the same as the case here where the fire originated on the non-carrying vessel. Petitioner respectfully submits this matter is of such importance that it should be decided by this Court.

Certainly under Reason 5 for Granting the Writ the Petition cannot be read as acknowledging in the least that there is any evidence to support the conclusion of the lower courts here that limitation of liability should be denied on account of any negligence of the fully licensed officers, or acknowledgment of any privity to or knowledge of any unseaworthiness by petitioner.

Turning to the other contentions of the Mitsubishi opposition brief, on p. 13 of the brief it is stated that damage to cargo caused by a collision occurring with "privity and knowledge" and destruction of cargo by fire caused by the "design and neglect" are "equivalent concepts". *Craig v. Continental Insurance Co.,* 141 U.S. 638 (1891).

This is plainly an erroneous view of the holding in that case and of the law: The limitation of liability (against *all* claimants, including owners of cargo on petitioner's vessel) accorded by the provisions of Section 183(a) of Title 46, U.S. Code, is *separate and distinct* from the exoneration from liability to cargo on the vessel granted by the Fire Statute, Section 182 of Title 46. The holding of this Court to this effect is plainly put in the quotation on page 49 of the Petition, from the Court's decision in *Consumers Import Co. v. Kawasaki Kisen Kabushiki Kaisha,* 320 U.S. 249, 64 S.Ct. 15 (1943), which need not here be repeated.

Replying to the Mitsubishi brief opposing grant of the writ for Reason 3, in (A), page 4 of that brief, there is no evidentiary support for the attempt to reconcile the contention of the UNION RELIANCE captain that his vessel's steering gear or equipment failed and this caused his vessel to travel across channel—he specifically testified without any corroborating evidence that his vessel did *not* get close to her starboard bank—and the BEREAN pilot's detailed testimony that the UNION RELIANCE did sheer away from the bank when it moved "past the ranges" on making the bend. The Mitsubishi suggestion that each fault contributed to the across-channel movement is simply speculation.

Nor do any authorities, including those cited by Mitsubishi, hold that where a shipowner denies any mechanical failure, and contends as does Petitioner here that the vessel's sheer was caused by navigational error, that it must take the absurd position of trying to imagine possible other causes and refute fault in connection with each.

As Mitsubishi plainly implies, there was no expert or logical support for the UNION RELIANCE'S captain affirmations that the steering wheel on the bridge locked and this showed the vessel's steering engines failed. (The captain was of course on the bridge for the bare three or four minutes between the commencement of the sheer and the collision. He jumped overboard and certainly could not have observed the steering engines. The assistant electrician, who was at all times in the steering engine room, and the chief engineer and chief electrician who ran to it just before the collision, said the steering engines and rudder operated properly until the impact.) The chief engineer applied the words "absolutely impossible" to the theory that lack of oil in the steering system could lock the wheel

on the bridge. R. 2269. (His testimony that locking of the wheel could be caused only by jamming of the gears on the bridge, R. 22, is apparently concurred in by Mitsubishi, at page 7 of the brief.)

Further, due diligence or none is immaterial where there is as here no substantial evidence of any failure of machinery. The reference on page 10 of the brief to lack of spare parts is directly contrary to the testimony of the First Assistant Engineer, R. 4861-2, and of course if using wooden blocks to support a weak solenoid coil caused an overload and a fuse to blow and thus stopped an electrical motor, how can it be argued that using wooden blocks could close circuits and thus run the motor? Such is the dilemma in which Mitsubishi (and the Court below it should with respect be noted) finds itself in arguing for the wooden block-blown fuse theory.

Mitsubishi's point (B), p. 10 of its brief, the unseaworthiness of the main engines of the UNION RELIANCE.

Much is made of the reduced power which of course results from aging of engines. But as the witness Muh testified, the main engines were opened and examined before the vessel sailed from Taiwan and passed by Lloyd's surveyor as seaworthy and likewise so considered by Mr. Muh, himself a qualified marine engineer. R. 2781-2782.

And here again Mitsubishi's argument is self-defeating: If the vessel's reduced power reduced her astern maneuvering speed it of course to a like extent reduced her ahead speed, and it cannot be reasonably urged that the reduced power was causative.

What rule grants limitation only to ships with new engines?

Mitsubishi's point (C), p. 11 of its brief, on the owner's failure to instruct the officers.

In the reply made above to the Lucy Duncan brief this matter of the knowledge of the Chief Engineer and the Captain of the UNION RELIANCE about use of the vessel's engines is considered.

Mitsubishi's point (D), p. 12 of its brief, re the ship's telephones.

As the petition points out, there is *no* evidence that the UNION RELIANCE telephone system was unseaworthy, and the testimony of the vessel's crew that the telephone system was in all respects operative is full and complete. It is amazing indeed that it can even be argued, to any persons who use telephones and thus are acquainted with the delays nearly always encountered in answering telephones and the difficulties often met with in understanding telephone conversations, that for short distances such as on shipboard using messengers proves telephones are inoperative. This glaring *non-sequitur* is completely illogical: A messenger covering a short distance is far faster than getting someone to a telephone and explaining a matter to him.

5. To the Opposition Brief of American Cyanamid Company

Upon page 3 of this opposition brief it is acknowledged, as it must be, that the Coast Guard regulations require inflammable cargoes with lethal characteristics to be carried in cargo tanks "separated from the skin of the ship by cofferdams, double bottoms or similar void spaces".

The actual language of the regulation is ". . . or in tanks built integral with the vessel's hull and completely sep-

arated from the shell of the vessel by means of wing tanks, cofferdams, double bottoms or similar voids" (46 C.F.R. § 39.05-1)—language far stronger than the brief suggests. And it is of course undisputed that the BEREAN had only wing tanks and *not* cofferdam spaces around the center tanks, and hence to comply with the regulation could have only carried the acrylonitrile in a center tank. Had it done so, none of the lethal cargo could have escaped from the collision.

The brief then goes on to say ". . . this regulation was not designed to protect the escape of such cargo following a collision". What is then the purpose of the regulation, to prevent contamination of the cargo? And how would American Cyanamid explain the statutory language, 46 U.S.C. § 170(7), which directs the Coast Guard Commandant to make regulations for dangerous substances "In order to secure . . . against the hazards of health, life, limb, or property created by . . . dangerous . . . substances", or the language of the regulation, 46 C.F.R. § 146.01-1, "The purpose of the regulations . . . is to promote safety . . . in the transportation of explosives or other dangerous . . . substances"?

How can it be denied that acrylonitrile is a "poisonous liquid . . . known to be so toxic to man as to afford a hazard to health in transportation" when the captain of the BEREAN himself died within a few months after this collision from inhalation of "fumes" while attempting to stop a small leak in the vessel's pumproom? R. 3301, Petitioner's Exh. 31-A, B, C. How can it be denied that since the American Cyanamid's own pamphlet describes the liquid in exact terms, compares it to well-known poisons, and expressly describes how carefully it must be

transported, it did not know that acrylonitrile was "so toxic to man as to afford a hazard to health during transportation", and hence a Class B poison under the exact language of the regulation 46 C.F.R. § 146.25-10?

On page 4 of the American Cyanamid brief it is stated ". . . no one testified that it was a common practice or custom to carry acrylonitrile in center tanks or in tanks separated from the skin of the ship by cofferdam". The witness McWaters testified that he had seen several barges loaded with acrylonitrile and in tanks on one ship after the cargo had been discharged although he had not actually participated in loading that particular product. R. 3315. After testifying about the lethally dangerous properties of acrylonitrile, he testified chemicals as dangerous as and even less dangerous are carried in the centerline cargo tanks on the vessels, tanks especially prepared for carriage of petrochemicals. R. 3318, 3323. He also testified he had been aboard vessels which had carried and were carrying acrylonitrile. R. 3336 and 3337. While he thus did not actually in so many words testify he had seen *acrylonitrile* carried only in centerline tanks of vessels, it is submitted his testimony can be reasonably construed to mean only that.

And how can it be seriously stated by American Cyanamid now, in this case, that "Inhalation of acrylonitrile vapors will cause headaches and nausea but will not leave any after-effects" (page 2 of its opposing brief) when it has been proved the very captain of the BEREAN lost his life from such inhalation!

But here the important question of law remains: Can a manufacturer of what it knows is a lethally toxic and dangerous product rely on a classification which permits

less care in transporting the product than its known properties require under the broad statutory regulations? Can it be held to have exercised due care when it does not use the precautions in transportation commonly employed in its own industry for the transportation of the same or less deadly chemicals?

Respectfully submitted,

ROBERT EIKEL,
Counsel for Petitioner,
205 Oil & Gas Building,
Houston, Texas 77002

CLARENCE S. EASTHAM
Of Counsel